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# Supreme Court of the United States

OCTOBER TERM, 1934

No. 11

GEORGE W. McCANDLESS, as Receiver of DUQUESNE GAS CORPORATION,

Petitioner,

*against*

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S REPLY BRIEF

## TABLE OF CASES CITED


PAGE

*Bernheimer* v. *Converse*, 206 U. S. 516, 5 L. Ed. 1163, 27 S. C. 755 (1907) ..... 9

*Bluefields SS. Co.* v. *Steele*, 184 Fed. 584 (C. C. A. 3rd 1911) ..... 2, 3

*Booth* v. *Clark*, 17 How. 322, 15 L. Ed. 164..... 7, 8

*Grant* v. *Leach*, 280 U. S. 351, 74 L. Ed. 470, 50 S. C. 107 (1930) ..... 9

*Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626 (C. C. E. D. Mich. 1907) ..... 6

*Mitchell* v. *Maurer*, 69 Fed. (2nd) 233 (C. C. A. 9th 1934 ..... 8

*Morris* v. *Wisconsin Hydraulic*, 4 Fed. Supp. 991 (D. C. S. D. N. Y. 1933)..... 7

*Muskrat* v. *United States*, 219 U. S. 346, 55 L. Ed. 246 (1911) ..... 1, 2

*Oakes* v. *Lake*, 290 U. S. 59, 78 L. Ed. 15 (1933).... 7

*Re Pacific Railway Commission*, 32 Fed. 241 (C. C. N. D. Calif. 1887) ..... 1

*Rust* v. *United Water Works Co.*, 70 Fed. 129 (C. C. A. 8th 1895) ..... 8

*White* v. *Ewing*, 159 U. S. 36, 15 Sup. Ct. Rep. 1018, 40 L. Ed. 67 (1895) ..... 3, 6

*Walker* v. *U. S. Ltg. & Htg. Co.*, 220 Fed. 393 (D. C. S. D. N. Y. 1915)..... 2

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## PETITIONER'S REPLY BRIEF

We do not doubt that, broadly stated, the exercise of the judicial power requires a "case or controversy" and that this "implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication." (*Muskrat* v. *United States,* 219 U. S. 346, 55 L. Ed. 246 (1911), pp. 6 and 7 of respondents' brief.)

But all courts, the Federal Courts included, have certain inherent powers, and amongst such is the power to come to the assistance of another Court in which a case is pending.

Mr. Justice Field in the case of *Re Pacific Railway Commission,* 32 Fed. 241 (C. C. N. D. Calif. 1887) (it is his language above quoted which was quoted with approval by this Court in the *Muskrat* decision) at page 256 says:

> "There are certain powers inherent in all courts."

As an instance of this, the Court goes on to state:

> "* * * courts of justice of different countries are bound mutually to aid and assist each other, for the

> furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the court before which the action is pending may send to the court within whose jurisdiction the witness resides a writ * * *. By this instrument the court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause their depositions to be taken in due course of law, for the furtherance of justice * * *."

We submit that a Court, in appointing an ancillary receiver, acts in aid of the Court in which the primary case is pending, and that this applies equally whether the proceeding for the appointment of the ancillary receiver be by the petition of the primary receiver or in the form of a separate ancillary bill.

As to the latter, although it is in form a separate suit, it is in reality a transparent simulation of a case or controversy,—it is unreal. Such proceeding in the form of a separate suit is regarded in every sense as ancillary to the primary receivership, with the consequence that the parties to the primary suit are deemed to be before the court in the ancillary receivership proceeding without the necessity of any *subpoena ad respondendum* (*Bluefields SS. Co.* v. *Steele,* 184 Fed. 584 (C. C. A. 3rd 1911)). Furthermore, the defendant in the primary suit, having consented therein to the appointment of the receiver, is powerless to object in the ancillary suit to the appointment of an ancillary receiver (*Walker* v. *U. S. Ltg. & Htg. Co.,* 220 Fed. 393 (D. C. S. D. N. Y. 1915)). The two prime essentials of a case are, therefore, absent: first, the obtaining of jurisdiction of the defendant, and, second, a controversy to be litigated. If, according to its form, it were viewed strictly as a separate suit which had to stand upon its own bottom, it would offend the rule set forth in the *Muskrat* decision that

a case or controversy "implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication."

Moreover, an ancillary proceeding in aid of a pending suit need not conform to all the jurisdictional requirements of an independent case.

In the case of *White* v. *Ewing,* 159 U. S. 36, 15 Sup. Ct. Rep. 1018, 40 L. Ed. 67, (1895) which is cited at page 33 of respondents' brief, this Court by Mr. Justice Brewer held that suits brought by a mere Federal equity receiver in the Court in which the primary suit is pending to recover upon promissory notes payable to the corporation in receivership are to be regarded as suits ancillary to the main suit, with the result that the limitations as to diversity of citizenship and amount in controversy do not apply to such suits.

In the *Bluefields SS. Co.* case, *supra,* the principle was applied to ancillary suits in other jurisdictions. The court said at page 587:

> "While an ancillary proceeding of the kind here considered will be controlled by the court before which it is prosecuted, and in that sense is an independent proceeding, its ultimate object is to aid the purpose of the original suit, and in that sense it is ancillary. Jurisdiction in such an ancillary suit therefore no more depends on diversity of citizenship than it does in a suit ancillary to an original suit pending in the same court. It depends alone on the existence of an original suit in one court which may properly be aided by proceedings in another court. It is unnecessary to refer to cases in which the federal courts have appointed receivers ancillary to receiverships in other jurisdictions without regard to the citizenship of the parties. There are many of them. One is *Southern Railway* v. *Carnegie Steel Co.,* 176 U. S. 257, Sup. Ct. 347, 44 L. Ed. 458."

It is entirely clear, therefore, that even the statutory limitations upon the jurisdiction of the Federal Courts are not, in a strict sense, controlling upon suits which may properly be regarded as in their nature ancillary to a primary case.

In the last analysis, the exercise of the judicial power in such situations chiefly emanates from the inherent power of the ancillary Court to come to the aid of the Court in which the primary case is pending.

Furthermore the requirement of a case is often satisfied for the purpose of preliminary proceedings, though actual suit on the basis of the possible controversy cannot be instituted till a later time. It "implies the existence of present or *possible* adverse parties". In connection with this statement Mr. Justice Field prepared a note (printed at p. 257 of 32 Fed.) which points out that Federal Courts have inherent jurisdiction over proceedings of grand juries and proceedings to perpetuate testimony though the actual case or controversy is only contemplated in the future.

At the very most, the difference in the two varying procedures which have been in vogue, perhaps about equally, is one of form.

As was done here, the primary receiver, by filing his petition setting out his appointment as such primary receiver and the exemplified copies of the proceedings in the pending primary suit and the need of the ancillary appointment in order to aid the primary Court, has adopted a form of procedure in line with the nature of the relief which the ancillary Court is being asked to grant. It is in accord with the legal and practical realities.

Where, however, the procedure by separate bill is adopted and a separate case thus merely simulated, although what is really being sought is the giving by the ancillary

Court of its aid to the case which is pending in the primary Court, the form of the procedure is less in accord with the realities.

If the ancillary Court should be deemed not to have the inherent power thus to come to the aid of the Court in which the primary case is pending and the decision of the Circuit Court of Appeals should thus be sustained, it would seem clearly to follow that such ancillary receiverships, whether brought about by the one form of procedure or the other, would be void, for it cannot truly be said that a transparently simulated case, such as is commonly constructed when the procedure adopted is by ancillary bill, really presents a separate case or controversy.

If the Court should hold as the respondents contend, that the only proper practice is to have a simulated bill in the foreign Court in order properly to bring about the appointment of an ancillary receiver, the primary Court would be powerless in many instances adequately to perform its trust. If, for example, the creditor who had brought the original primary bill could not, because of death or because of lack of diversity of citizenship in the ancillary jurisdiction, or would not, even if for venial reasons, participate in the simulated ancillary bill, the Courts would be helpless, with the consequence that defaulting fiduciaries, such as these defendants, must have immunity from accountability. It would scarcely do to say that under such circumstances the primary Court, through its receiver, could canvass about and find some other creditor with the requisite qualifications to cooperate in a simulated ancillary bill. Such a creditor might not exist, or, if he could be found, might not, for reasons good or bad, be willing to lend his aid. In any case it is not a happy thought that the law should put an officer of the Court, and virtually the Court for whom he is acting, in such an unbecoming position.

At page 11 of their brief, the respondents state:

> "* * * mere federal equity Receivers have no official power beyond the jurisdiction of the Courts appointing them * * *"

The authorities are to the contrary.

In *Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, (C. C. E. D. Mich. 1907) Judge Lurton states as follows at page 631:

> "*Zacher* v. *Fidelity Trust, etc., Co.*, 106 Fed. 593, 45 C. C. A. 480, *Booth* v. *Clark*, 17 How. 322, 15 L. Ed. 164, and *Great Western Mining, etc. Co.* v. *Harris*, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163, bear upon the disability of a receiver appointed by a court of one jurisdiction to sue in the courts of another, and have no application when the question is, as here, as to the authority of a receiver appointed by a federal court of one district over property situated in another district of the same state. Federal courts of different states are undoubtedly foreign courts as to each other in as full sense as are state courts of different jurisdictions. But it has never been held, that a federal court of one district is a foreign court as to another federal court of the same state, and manifestly, this is not so * * * ."

So it is clear that it is not a question of the *official power* of the receiver to act beyond the confines of the court which appointed him.

It is stated by this Court in *White* v. *Ewing*, quoted at page 33 of the respondents' brief, as follows:

> "* * * the possession of the receiver is the possession of the court; and the court itself holds and administers the estate through the receiver as its officer."

The Court was thus speaking of a mere Federal equity receiver.

Nevertheless, we do not believe that anyone would for a moment question that such a receiver could sue in a Federal Court foreign to the jurisdiction of his appointment for the recovery of the purchase price of assets of the receivership which had been sold by him pursuant to the direction of the primary Court, and this was recently so held in the case of *Morris* v. *Wisconsin Hydraulic,* 4 Fed. Supp. 991 (D. C. S. D. N. Y. 1933).

In the case of *Oakes* v. *Lake,* 290 U. S. 59, 78 L. Ed. 15, (1933) cited at page 9 of respondents' brief, this Court held that a foreign receiver could sue in the Federal Courts to recover possession of assets of the receivership estate, the dominion over which had been asserted against him. Although the receiver in that case was a State equity receiver rather than a Federal equity receiver, we do not think that anyone would doubt that the result would be the same in the case of any equity receiver whether Federal or State.

Whatever proceeding a receiver takes in line with the proper performance of his trust must properly be regarded as performed by virtue of his office. The receiver's official power or capacity to act is not so strictly limited as the respondents seem to think.

The question involved in this Court's decision in *Booth* v. *Clark,* and the other cases referred to by the respondents, is concerned, not with the power of the receiver, but merely with a question of state comity.

The respondents' argument that the primary receiver could not, because of lack of official power to do so, seek an order for the appointment of an ancillary receiver in aid of the primary suit is without the least legal foundation.

And the primary receiver, in seeking the appointment of an ancillary receiver in aid of the primary suit, was not

thus seeking to avoid the rule of *Booth* v. *Clark,* but was acting pursuant to that rule and in conformity with it.

At pages 18-21 of their brief, the respondents discuss the cases of *Rust* v. *United Water Works Co.,* 70 Fed. 129, (C. C. A. 8th 1895) and *Mitchell* v. *Maurer,* 69 Fed. (2nd) 233, (C. C. A. 9th 1934) which are cited by us. They state that these cases are distinguishable for the reason that in the one, by virtue of a New Jersey statute, and in the other, by virtue of a Delaware statute, the primary receivers took title to the corporate assets. At page 8 also they state that Delaware and New Jersey statutes provide that the receiver of a corporation organized under the laws of such states become vested with title to the corporation's property.

As to the *Rust* case, which arose in 1894, the New Jersey statute giving to the receiver title to the assets of the corporation, to which reference is thus made, but which is not specifically cited, did not become a law until 1896 (Public laws of New Jersey 1896, page 299).

While it is true in respect of the case of *Mitchell* v. *Maurer* that, at the time of the appointment in Delaware of the primary receivers, there was in effect Section 3884 of the Revised Code of Delaware, which provides that a receiver of a Delaware corporation appointed by a Delaware Court of Chancery is vested with title to the corporation's property, this fact does not, nevertheless, distinguish the case. The question involved in that case was not the right of the foreign receiver to sue. In that case, as in the instant case, the primary receivers had, upon their *ex parte* petition in the California District Court, obtained an order for the appointment of ancillary receivers. That appointment was made the subject of a *direct* attack on grounds similar to the grounds urged by the respondents herein. The question decided by the Court was that the appoint-

ment of the ancillary receivers brought about by such form of procedure was proper.

At page 28 of their brief, the respondents comment upon the numerous decisions of the state courts referred to in the note at the bottom of page 21 of our main brief, and state that "An examination of these decisions shows that many of these actions were instituted by receivers who under the laws of the State of their appointment were also quasi assignees." They fail to specify which cases. In preparing the note, we studiously refrained from citing cases the decision of which was based upon the *Bernheimer* v. *Converse* exception. Although the reports in several of the cases are somewhat obscure, we think that the cases cited in our note for the proposition stated all accepted the proposition that a foreign chancery receiver should be permitted by comity to sue, and that they are fairly cited for that proposition.

We beg leave to correct an error at the top of page 21 of our main brief. Our statement respecting the case of *Grant* v. *Leach* referred to the receiver as "a federal equity receiver" whereas in fact the receiver was a state equity receiver.

Respectfully submitted,

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